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ALEXANDER L. STEVAS,
CLERK

No. 80-6045

In the Supreme Court of the United States

OCTOBER TERM, 1981

RUBIN KREMER,
Petitioner,

v.

CHEMICAL CONSTRUCTION CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

FREDERICK A. O. SCHWARZ, JR.
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N.Y. 10005
(212) 422-3000
Counsel for Petitioner

ROBERT LAYTON
LAYTON AND SHERMAN
50 Rockefeller Plaza
New York, N.Y. 10020
(212) 586-4300
Counsel for Respondent

PETITION FOR CERTIORARI FILED JANUARY 13, 1981.
CERTIORARI GRANTED JUNE 22, 1981.

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(78 Civ. 3182)

KREMER

v.

CHEMICAL CONSTRUCTION CORP.

RELEVANT DISTRICT COURT DOCKET ENTRIES

7/14/78 Complaint and issued Summons

9/5/78 Defendants' Memorandum of Law, Affidavit and Notice of Motion for an order pursuant to Rule 12(b) of the FRCP, dismissing action on grounds of Res Judicata filed

9/14/78 Plaintiff's Reply in opposition to defendant's motion to dismiss action on grounds of Res Judicata filed

12/19/78 Opinion: defendant's motion to dismiss action denied (Pierce, J.) filed

3/1/79 Answer filed

3/12/79 Pro se plaintiff's Reply in opposition to Answer filed

4/26/79 NOTICE OF REASSIGNMENT, from Pierce, J. to Sofaer, J.

9/20/79 Opinion: The motion to dismiss is granted and the complaint is dismissed without costs to either side (Sofaer, J.) filed

9/24/79 Judgment filed

10/17/79 Plaintiff's Notice of appeal to the USCA 2nd Circuit from the decision dismissing the complaint filed

(79-7748)

KREMER

v.

CHEMICAL CONSTRUCTION CORP.

RELEVANT COURT OF APPEALS DOCKET ENTRIES

10/26/79 Copy of notice of appeal on behalf of Rubin Kremer filed and copy of order granting forma pauperis filed

1/7/80 Appellant Kremer's brief filed

2/11/80 Appellee Chemical Construction Corp.'s brief filed

2/21/80 Appellant Kremer's reply brief filed

3/12/80 Case argued before Hon. Lumbard, Friendly, Meskill, CJJ.

6/2/80 Judgment affirmed by published opinion and judgment filed

6/5/80 Appellant Kremer's Petition for rehearing and petitions for rehearing en banc filed

7/25/80 EEOC amicus brief in support of petition for rehearing en banc filed

1/20/81 Notice of filing petition for certiorari with Supreme Court filed

6/27/81 Certified copy of order from Supreme Court granting forma pauperis and writ of certiorari filed

April 20, 1976

Rubin Kremer
2741 Matthews Ave.
Bronx, New York, N.Y. 10467

United States Equal Employment Opportunity
26 Federal Plaza, Room 4000
New York, N.Y.

Gentlemen:

The enclosed story took place at Chemical Construction Corporation, One Penn Plaza, New York 10001, on August 1, 1975.

This kind of relations between people, namely, conspiracy and discrimination are incopatible with the principles of human rights and should not pass over in silence in the file of the Personnel Department of Chemical Construction Corporation.

I am ready and willing to give you farther explanations which will be helpful to elucidate the real reasons of my lay off, and the conditions I worked with Chemical Construction Corporation.

In my opinion this lay off should be canceled. Chemical Construction Corporation who accepted the action of Mr. E. Paul and Mr. J. Puc should not only pay full compensation for the time I was unable to find a job but also a penalty for the bitter experience I have been sorely afflicted. I would like to ask you to look into this question in accordance to the compulsory law in the United States of America. Thank you.

Sincerely,

R. KREMER

CHARGE OF DISCRIMINATION	EEOC Charge No.	Form Approved OMB No.

Instructions

If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's District Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE. (Attach extra sheets of paper if necessary.)

Cause of Discrimination

- ☐ Race or Color ☐ Sex
- ☒ Religious Creed
- ☒ National Origin

Name (Indicate Mr. or Ms.)	Date of Birth
Mr. Rubin KREMER	November 21, 1917
Street Address County	**Social Security No.**
2741 Matthews Ave.	180-46-5915
City, State, and Zip Code	**Tel. No. (include area code)**
Bronx, New York, N.Y. 10467	212-231-8229

THE FOLLOWING PERSON ALWAYS KNOWS WHERE TO CONTACT ME

Name (indicate Mr. or Ms.)	Tel. No. (include area code)
Mr. Abraham STERN	212-882-9896/212-011-2917
Street Address	**City, State, and Zip Code**
2520 Radcliff Ave.	Bronx, New York, N.Y. 10469

LIST THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT WHO DISCRIMINATED AGAINST YOU (if more than one, list all)

Name	Tel. No. (include area code)
Chemical Construction Corporation	212-239-5100
Street Address	**City, State, and Zip Code**
One Penn Plaza	New York, N.Y. 10001

Others Who Discriminated Against You (if any)		
Charge filed with state/local gov't ☐ yes ☐ no	**Date filed**	**Agency charge filed with (Name & address)**

Approximate No. of employees/members of company or union this charge is filed against	Date most recent or continuing discrimination took place (Month, day, and year)
About 800	August - December 1975

Explain what unfair thing was done to you and how other persons were treated differently. Understanding that this statement is for the use of the United States Equal Employment Opportunity Commission, I hereby certify:

In November 1973 Mr. Janoz Puc was appointed as the Supervisor of the Piping Analytical Department. Since that time I was permanently discriminated not to be full employed and to charge the time spent in

the Company to "C", as idle time. In the same time other employees were working overtime. This policy should help him to remove me from the Company, which finally took place on August 1, 1975.
In all this proceedings Mr. Karl Hou was his chief advisor. When I left the Company he told me "the time is come".

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief		NOTARY PUBLIC	Subscribed and sworn to before me this date (Day, month, and year)
Date: May 6, 1976	Charging Party (Signature): s/ R. Kremer		Signature (If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the District Office. The Commission will notarize the charge for you at a later date.)
Subscribed and sworn to before this EEOC representative.			
Date: 5-6-76	Signature and Title: s/ Illegible		

EEOC Form 5 Jun 72 Previous editions of this form may be used.

EEOC AFFIDAVIT ☐ Respondent ☒ Charging Party ☐ Witness

After being duly sworn and upon my oath, I depose and say:

Name	Age	Tel. No. (Give area code)
Rubin KREMER	58	212-231-8229

Address (Number and Street)	City
2741 Matthews Ave.	Bronx, New York, 10467

County/Parish	State/Commonwealth
	New York

THE FOLLOWING PERSON CAN ALWAYS CONTACT ME

Name	Relationship	Tel. No. (Give area code)
Mr. Abraham Stern	Friend	212-882-9896 212-OL3-2917

Address (Number and street)	City And State/Commonwealth
2520 Radcliff Ave.	Bronx, New York 10469

STATUS OF EMPLOYMENT

Check One ☒ Not Working ☐ Working ☐ Sought Employment At

Name of Employer

Type Of Business	Date of Employment/ When Employment Was Sought	
	From	To

Position Title	Department

Location (Number and street)	City

County/Parish	State/Commonwealth	Work Tel. No.

Additionally, While working on a proposal of an ammonia plant I pointed out that the information which we received are incorrent. The job was taken away from me and never came back. For several days I was sitting idle, despite that I asked to give me some work to perform.

- When I checked the ammonia job/2008/Mr. Puc did not allow to charge the time on the job number, but insist to charge "G".
- When I worked on a proposal of an urea plant based on the Snam Progetti process, after the fundamentals were solved, the drawings were sent to drafting. The job never came back to me. Other employees were working on. All arround laughing aloud told me "They took from you the ammonia job and now the urea job. The drawings which I had gradually disappeared I was sitting idle.
- Mr. Puc used to order me to perform some work which usually should not

be given to experienced individuals. Besides the normal weekly time sheet he insist to write a special statement on what I have spent the time, in order to show what kind of work I have performed.

- At the end of March 1975, Mr. E. Poul informed me that I am laid off. I disclosed the conditions I worked to the Personnel Manager, Mr. W. Mager. This lay off was cancelled. The working conditions improved slightl
- On July 31, 1975 Mr. E. Poul told me that starting from August 1, 1975 I am laid off, because of lack of work. I worked at that time with Coalcon According to my knowledge Coacon sent to the Personnel Dpt. of Chemical Construction Corp. a list of employees from Coalcon want to continue their work. I was on the list. Only I was turned down. Unfortunately, nobody want to talk to me. And so I was thrown out.
- On August 8, 1975 Mr. Parish Shah was hired in Piping Analytical Dept.
- On August 10, 1975 Mr. Navin Shah was rehired. Laid off on August 1, 1975.
- About August 23, 1975 Mr. Tapan Banerjee was hired in Piping Anal. Dept. There was no lack of work for me in CPPC.
- On November 2, 1975 based on an ad of CPPC in The New York Times and on Dr. Th. Gibians statement of September 24, 1975/see enclosure/I sent an application to Mr. Don Steenland and Mr. J. Kevin Coleman of the Personnel Dept. of CPPC. My Education, Background and Experience suited exact with all the requirements listed in the ad.

On December 4, 1975 I received a letter from Mr.D. Steenland and Mr. J.K. Colemen that my experience is not suited to their requirements/see encl./.

I swear or affirm that I have read the above statement and that it is true to the best of my knowledge, information and belief.

Signature	Social Security No.	Total No. Of Pages
s/ Rubin Kremer	180-46-5915	2

SUBSCRIBED AND SWORN TO BEFORE THIS EEOC REPRESENTATIVE

Date	Title	Signature
5-6-76	(Illegible)	(Illegible)

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

Complaint No.

EEOC Charge No.

STATE DIVISION OF HUMAN RIGHTS
ON THE COMPLAINT OF
RUBIN KREMER, COMPLAINANT

—against—

CHEMICAL CONSTRUCTION CORPORATION, RESPONDENT(S)

I, Rubin Kremer residing at 2741 Matthews Avenue, Bronx, N.Y. Tel. No. 231-8229 charge the above-named respondent(s) whose address(es) is (are) 1 Penn Plaza, New York, N.Y. 10011, with an unlawful discriminatory practice relating to employment in violation of Article 15 of the Executive Law of the State of New York (fill in field of jurisdiction) on or about August 1975 because of AGE (X) RACE ( ), CREED (X), COLOR ( ), NATIONAL ORIGIN ( ), SEX ( ), DISABILITY ( ), MARITAL STATUS ( ), RETALIATION ( )

The particulars are:

1: I was employed by Chemical Construction Corporation in June 25, 1973 as a piping analytical engineer. I was terminated on August 1, 1975.

2: I was told that I was layed off due to lack of work. In August of 1975 I learned that several people were hired and rehired in the piping analytical department.

3: The people hired and rehired are much younger than I, and previous to my being layed off I was the only Jewish person in the department.

4: I am 58 years of age and of the Jewish faith, and I charge Chemical Construction Corporation with an unlawful discriminatory practice relating to employment, by denying me equal terms, conditions and privileges of employment because of my age and creed, in violation of the Human Rights Law of the State of New York.

I have not commenced any other civil, criminal or administrative action or proceeding in any court or administrative agency based upon the same grievance.

[X] I also charge the above-named respondent(s) with violating Title VII Civil Rights Act 1964, as amended (covers race, color, religion, sex, national origin relating to employment) and hereby authorize SDHR to accept this verified complaint on behalf of EEOC subject to the statutory limitations contained in Title VII.

/s/ Rubin Kremer
RUBIN KREMER

STATE OF NEW YORK)
COUNTY OF BRONX) ss.:

Rubin Kremer, being duly sworn, deposes and says: that he is the Complainant herein; that he has read (or had read to h——) the foregoing complaint and knows the contents thereof; that the same is true of h—— own knowledge except as to the matters therein stated on information and belief; and that as to those matters, he believes the same to be true.

/s/ Rubin Kremer
RUBIN KREMER

Subscribed and sworn to before me
this 20th day of May —, 1976

STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS
COMPLAINANT'S INFORMATION SHEET
———————— REGIONAL OFFICE

COMPLAINANT:

RESPONDENT:

I, Rubin Kremer, the complainant in the above matter acknowledge the following:

1. I have been advised that according to the Division's Rules of Practice:

   a. The Division or I shall be able to reasonably amend my complaint;

   2. This complaint may be withdrawn by me at any time before the service of a Notice of Public Hearing

   c. Upon my application, or on his own motion, the Commissioner may reopen the proceedings after this matter has been closed

   d. If this matter is conciliated, I will be given fifteen days in which to agree to or object to the terms of conciliation

   e. I may be present and shall be allowed to present testimony in person or by counsel and cross-examine witnesses in a Public Hearing on this matter.

2. I have been informed that a copy of my complaint and/or the determination in this matter will be sent to ————————, The local human rights commission, or referral agency of my choice.

3. I have been informed of my right to retain private counsel.

4. a. I understand that I, or my attorney, may review the Division's file in this matter.

   b. I also understand that I, or my attorney, may copy by hand any material in the file.

5. I am to notify the Regional Office of the Division of any change in my address, telephone number, or place of employment which may occur during the course of the Division's handling of this matter.

6. Except for emergency situations, I shall give the Division's Regional Office four days' notice in the event that I cannot attend any scheduled conference at which my presence has been requested.

7. I acknowledge receipt of a copy of the complaint in the above entitled matter.

Date: May 20, 1976

/s/ Rubin Kremer
RUBIN KREMER
Complainant's Signature

NEW YORK STATE EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS

Case Nos. Ia-E-AC-3576-76E
E-AC-42821-76E

RUBIN KREMER, COMPLAINANT

vs.

CHEMICAL CONSTRUCTION CORPORATION, RESPONDENT

DETERMINATION AFTER INVESTIGATION

On May 20, 1976, Rubin Kremer, Rubin Kremer filed a verified complaint with the State Division of Human Rights charging the above-named respondent(s) with an unlawful discriminatory practice relating to employment, because of age and creed in violation of the Human Rights Law of the State of New York.

After investigation and following a review of related information and evidence with named parties, the Division of Human Rights has determined in the above-entitled complaint that there is no probable cause to believe that the respondent(s) engaged in or was (were) engaging in the unlawful discriminatory practice complained of.

This determination is based on the following:

The record shows that this complainant was not rehired by the respondent employer because one employee with greater seniority was chosen.

The other person that was rehired, filled a lesser position than that held by complainant.

Complainant's creed, or age, was not a factor in these selections.

This complaint is therefore ordered dismissed, and the file closed.

THE COMPLAINANT OR ANY PARTY TO THE PROCEEDING BEFORE THE DIVISION MAY APPEAL THIS ORDER TO THE STATE HUMAN RIGHTS APPEAL BOARD, TWO WORLD TRADE CENTER 82ND FLOOR, NEW YORK, NEW YORK 10047, BY FILING A NOTICE OF APPEAL WITHIN FIFTEEN (15) DAYS AFTER THE DATE OF THE SERVICE OF THIS ORDER.

Dated: Apr. 28, 1977

STATE DIVISION OF HUMAN RIGHTS

By /s/ George C. Findlay
GEORGE C. FINDLAY
Regional Director

To: Mr. Rubin Kremer
c/o N. Rosenberg
762 Brady Ave., Apt. 127
Bronx, N.Y. 10462

Chemical Construction Corporation
1 Penn Plaza
New York, N.Y. 10001

Att: Mr. Don Steenland, Personnel Director

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD

Case No. E-AC-4281-76E

Appeal No. 4151

RUBIN KREMER, COMPLAINANT-APPELLANT

vs.

CHEMICAL CONSTRUCTION CORPORATION, RESPONDENT

ORDER

The above-entitled appeal having been filed with this Board on May 10, 1977 and having come on to be heard before Honorable Richard Wong on the 16th day of September, 1977 and Rubin Kremer, complainant-appellant having appeared in person, argued and submitted a brief on his own behalf, and respondent having appeared by Layton & Sherman, Esqs., Donald M. Crook, Esq., of Counsel, who argued on behalf of respondent, and the State Division of Human Rights having appeared by Gladys M. Foster, Esq., Senior Attorney, who submitted on the record, and

The Board having reviewed the record herein and having considered the arguments of the parties, and the brief on behalf of complainant-appellant, and a majority of the Board having decided that the Determination and Order of the State Division of Human Rights dismissing the complaint of the complainant-appellant was not arbitrary, capricious or an abuse of discretion, (Hon. T. Blum not participating) it is

ORDERED that the Determination and Order of the State Division of Human Rights made herein on April 28, 1977 be, and the same is hereby in all respects affirmed.

STATE HUMAN RIGHTS APPEAL BOARD

By /s/ Irma Vidal Santaella, Chairman
IRMA VIDAL SANTAELLA

Dated & Mailed: November 25, 1977

To: (see attached list)

STATE OF NEW YORK
EXECUTIVE DEPARTMENT

STATE HUMAN RIGHTS APPEAL BOARD
Two World Trade Center
New York, N.Y. 10047

TO: All Parties to this Proceeding—Appeal No. 4151

NOTICE OF ORDER

PLEASE TAKE NOTICE that herewith attached is the Order of the State Human Rights Appeal Board.

ANY COMPLAINANT, RESPONDENT OR OTHER PERSON AGGRIEVED BY THIS ORDER MAY OBTAIN JUDICIAL REVIEW THEREOF. *Such proceeding shall be brought in the Appellate Division of the Supreme Court of the State in the appropriate judicial department WITHIN 30 DAYS OF SERVICE OF THIS ORDER.* (See Section 298, Human Rights Law.)

Attachment:

Rubin Kremer
c/o R. Garkawe
2120 Wallace Ave., Apt. 2B
Bronx, New York, N.Y. 10462

Tel.-/212/-892 1322

December 4, 1977

Equal Employment Opportunity Commission
New York District Office
90 Church Street, Room 1301
New York, N.Y. 10007

Mr. Arthur W. Stern
District Director

Charge No.: TNY 6—1526
Re.: Chemical Construction Corporation

Dear Mr. Stern:

On May 20, 1976 based on the instructions in your letter of May 7, 1976 I filed a formal complaint with the Division of Human Rights of the Executive Department of the State of New York, alleging that Chemical Construction Corporation, unlawfully discriminated against me by refusing to reemply as a piping analytical engineer because of age and crede, in violation of Section 296 of the Human Rights Law of the State of New York.

After the filing of the complaint on May 20, 1976 the following proceeding ensued:

1. The Conference arranged by the Human Rights Division at 270 Broadway, N.Y. for Conference and Production of Records, on August 12, 1976 in the New York State H.R.D. did not take place.
2. On August 24, 1976 a review of the Exhibits presented by the respondent and prepared by Mr. Don Steenland, Personnel Director of Chemico, conducted be-

fore Martha Garland, a Field Representative of the Human Rights Division took place. I verbally turned down all the statements entirely and demonstrated with documents that they are untrue and false. The Field Representative failed to include in her "Complainants Rebuttle" the basic information surrounding my termination. Respondent did not attend this review.

3. On November 9, 1976 I was investigated by Ms. Lillian H. Fennel, Regional Director of the Human Rights Division. I informed the Director of the H.R.D., between others, that to my knowledge Chemical Construction Corporation signed the Anti-Jewish and Anti-Israeli Arab Boycott. After this investigation Ms. Fennel stated "You were fired because you are Jewish not because of your age". There is no record in the file that this investigation took place.

4. Mr. George C. Findlay, Regional Director of the Human Rights Division, during a brief appointment at the end of March, 1977 stated, "Your case looks favourable". There is no record in the file that this appointment took place.

5. By determination dated April 28, 1977 the State Division of Human Rights, by George C. Findlay, Regional Director, dismissed my complaint on the ground that, "The record shows that this complainant was not rehired by respondent employer because one employee with greater seniority was chosen. The other person that was rehired, filled a lesser position than that held by complainant".

6. The following people were hired and rehired in the Piping Analytical Department 153 of Chemical Process Plant Co./CPPC/ in August 1975.

   —Mr. Parish Shah, age about 25-27, was hired on August 8, 1975. He did not work previously in

the Piping Analytical Dept. 153 of CPPC, and did not work on the Russian ammonia job/2008/

—Mr. Navin Shah, age about 25-27, rehired on August 10, 1975. Laid off on August 1, 1975.

—Mr. Tapan Banerjee age about 25, was hired about August 23, 1975. He never previously worked in Piping Analytical Dpt. of CPPC. Laid off on October 31, 1975 and transferred to Coalcon.

—Mr. Krishma Raj was rehired sometime in August 1975. Laid off on August 1, 1975.

7. Based on Dr. Th.G. Gibians statement of September 24, 1975 and on Chemicoss advertisements in The New York Times I applied for a job with Chemico:

—on November 2, 1975,	Ad. on Nov. 2, 1975
—on May 21, 1976,	Ad. on May 16, 1976
—on July 16, 1976,	Ad. on July 11, 1976
—on August 15, 1976,	Ad. on August 15, 1976
—on September 8, 1976,	Ad. on September 5, 1976

All the positions advertised corresponded exactly with my background and qualifications. None of the advertisements called for engineers who had previous experience with Chemico or in the U.S., as respondent contendet. However, the advertisements on August 15, 1976 and on September 5, 1976 called for engineers with piping analytical experience, a position I held previously with Chemico.

8. Mr. Don Steenland in his letter of September 17, 1976 to the New York State Division of Human Rights stated between others, "Further we want to make it very clear that we would not re-employ him merely for the sake of appearing his claims against Chemico.

9. Mr. John Puc former supervisor, despite his negative attitude towards me in his opinion of May 27, 1976 could not deny the following, "He was technically competent piping analytical engineer with excellent background in other engineering branches such as process, exceeding the average experience of piping analytical engineer. His performance was qualitatively very good. Unfortunately his competence was offset by his slowness in performance of his duties". There were never complaints from the Project Management of my "slowness". On the contrary, the Management was satisfied when I pointed out incorrectness in order to avoid unnecessary work in our department as well in other departments to whom we released information for further performance.

10. Mr. E. Paul in his performance rating of June 19, 1975 stated, "Hold for knowledge and skills. Improve comunicat." One month later on July 29, 1976 *in order to remove me from the Company my performance rating became "Below Average"*. It should be noted that in June 1975 I worked on the insulation project of the piping system for the Russian ammonia job /2006/, when I changed Mr. E. Pauls approach, with his approval, I saved an amount of money equal approximately to a ration eight to one.

11. By notice dated May 10, 1977, I appealed the Human Rights Division determination to the State Human Rights Appeal Board. After argument before the State Human Rights Appeal Board on September 16, 1977, by order dated November 25, 1977 the order appealed from was affirmed. It should be noted that the Presiding Member Comm. R. Wong found that the file does not contain my brief to the Appeal Board dated May 10, 1977. The Appeal Board did not examine the witnesses listed on page 5 in my brief.

12. The determination by the State Division of Human Rights and the order of the State Human Rights Appeal Board constituted final agency action under the Human Rights Law of the State of New York and the Civil Practice Law and Rules. This determination and order dismissing the complaint were made in violation of law, were arbitrary and capricious, constituted an abuse of discretion, if lawfully applied, did not bar unlawful discriminatory practice. Therefore I ask the United States Equal Opportunity Commission to reconsider this case in accordance to the compulsory law in the United States of America.

Sincerely,

R. KREMER

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION
FIRST DEPARTMENT

RUBIN KREMER, PETITIONER-APPELLANT

v.

THE STATE DIVISION ON HUMAN RIGHTS,
THE STATE HUMAN RIGHTS APPEAL BOARD
and CHEMICAL CONSTRUCTION CORPORATION, RESPONDENTS

NOTICE OF PETITION

SIRS:

PLEASE TAKE NOTICE that upon the annexed petition of Rubin Kremer, verified the 6 day of December, 1977, an application will be made at a term of this court to be held at the courthouse thereof, located at Madison Avenue and 25th Street, Borough of Manhattan, City of New York, on the 28 of December, 1977, at 10:00 a.m., or as soon thereafter as counsel can be heard, for a judgment pursuant to § 298 of the Human Rights Law and pursuant to CPLR Article 78, setting aside the determination and order made by respondents dismissing petitioner's complaint of an unlawful discriminatory practice and denying his reinstatement as a piping analytical engineer with Chemical Construction Corporation, and compelling said respondents to reinstate petitioner as such engineer, and awarding his back pay, and

for such other and further relief as may be deemed just and proper.

Dated: December 5, 1977
New York, N.Y.

Yours, etc.

RUBIN KREMER
c/o R. Garkawe
2120 Wallace Ave.
Apt. 2B
Bronx, New York
10462

Tel.: 892 1322

TO: Chemical Construction
Corporation
Mr. Don Steenland,
Personnel Director
One Penn Plaza
New York, N.Y. 10001

State Human Rights Appeal
Board
Two World Center, 82nd Floor
New York, N.Y. 10047

Donald M. Crook, Esq.
Layton & Sherman, Esqs.
50 Rockefeller Plaza
New York, N.Y. 10020

12 Encl. No. 12

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 27, 1978

Present-Hon. Francis T. Murphy, Jr., Presiding Justice
Samuel J. Silverman
Herbert B. Evans
Arnold L. Fein
Arthur Markewich Justices

1877

[M-4560]

RUBIN KREMER,

—against—

THE STATE DIVISION ON HUMAN RIGHTS,
THE STATE HUMAN RIGHTS APPEAL BOARD
and CHEMICAL CONSTRUCTION CORPORATION, RESPONDENTS

The above-named petitioner having presented a petition to this Court praying for an order, pursuant to Section 298 of the Executive Law, setting aside and annulling the determination of respondent The State Human Rights Appeal Board dated November 25, 1977, which affirmed an order of the respondent The State Division on Human Rights dated April 28, 1977, dismissing petitioner's complaint and determining there was no probable cause to believe that respondent Chemical Construction Corporation engaged in the unlawful discriminatory practice complained of, and respondent Chemical Construction Corporation having submitted a memorandum in answer to said petition,

Now, upon reading and filing the notice of application, with proof of due service thereof, the petition of Rubin Kremer, verified December 6, 1977, and the memorandum of Rubin Kremer, all read in support of the application, and the memorandum of Messrs. Layton and Sherman in opposition to said application, and after hearing Mr. Rubin Kremer, appearing *pro se*, for the application, and Messrs. Layton and Sherman opposed; and due deliberation having been had thereon,

It is unanimously ordered that the determination of the respondent, The State Human Rights Appeal Board, be and the same hereby is confirmed, without costs and without disbursements.

ENTER:

JOSEPH J. LUCCHI
Clerk

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
NEW YORK DISTRICT OFFICE
90 Church Street, Room 1301
New York, New York 10007
264-7161

Charge No. 021-76-1526

RUBIN KREMER, c/o N. Rosenberg,
762 Brady Ave. Apt. 127,
Bronx, New York 10462, CHARGING PARTY

CHEMICAL CONSTRUCTION CORPORATION,
1 Penn Plaza, New York, N.Y. 10001, RESPONDENT

DETERMINATION

Under the authority vested in me by Section 29 CFR 1601.19(b)(d) of the Commission's Procedural Regulations (September 27, 1972), I issue, on behalf of the Commission, the following Determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII of the Civil Rights Act of 1964, as amended, and the timeliness, deferral, and all other jurisdictional requirements have been met. Substantial weight has been accorded to the findings of the New York State Division of Human Rights, which are attached.

Having examined the New York State Division of Human Rights' findings and the record presented, I conclude that there is not reasonable cause to believe that the charge is true.

This determination concludes the Commission's processing of the subject charge. The Charging Party may pursue this matter further, if so desired, by filing a

private action in Federal District Court within 90 days of receipt of this letter, and by taking the other procedural steps set out in the enclosed NOTICE OF RIGHT TO SUE.

FOR THE COMMISSION:

/s/ Arthur W. Stern
Arthur W. Stern
District Director

Date May 11, 1978

Enclosures: 706 Agency Findings &
Notice of Right to Sue

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Dismissal)

TO:

Rubin Kremer
c/o N. Rosenberg
762 Brady Ave. Apt. 127
Bronx, New York 10462

FROM:

Equal Employment Opportunity Commission
New York District Office
90 Church St., Rm. 1301
New York, N.Y. 10007

CHARGE NUMBER 021-76-1526

EEOC REPRESENTATIVE Arthur W. Stern, District Director

TELEPHONE NUMBER 212 264-7167

(See Section 706(f)(1) and (f)(3) of the Civil Rights Act of 1964 on reverse of this form)

This is your NOTICE OF RIGHT TO SUE. It is issued because the Commission has dismissed your charge. Your charge was dismissed for the following reason:

☐ No jurisdiction, therefore the Commission has no authority to process your charge further.

☒ No reasonable cause was found to believe that the allegations made in your charge are true, as indicated in the attached determination.

☐ You failed to provide requested necessary information, failed or refused to appear or be available for necessary interviews/conferences or otherwise refused to cooperate to the extent that the Commission has been unable to resolve your charge. You had more than 30 days in which to respond to our final written request.

☐ The Commission has made reasonable efforts to locate you and has been unable to do so. You have had at least 30 days in which to respond to a notice sent to your last known address.

☐ The respondent has made a written settlement offer which affords full relief for the harm you alleged. At least 30 days have expired since you received actual notice of this settlement offer.

The issuance of this NOTICE OF RIGHT TO SUE terminates the Commission's processing of your charge. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in United States District Court. IF YOU DECIDE TO SUE, YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE TO SUE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(f)(1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U.S. District Court in the form and manner it requires. *Your request to the U.S. District Court should be made well in advance of the end of the 90-day period mentioned above.*

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdic-

tion to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of this Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ Arthur W. Stern
ARTHUR W. STERN
District Director
(*Typed Name and Title of EEOC Official*)

_____
(Date)

cc: Chemical Construction Corp.
1 Penn Plaza
New York, N.Y. 10001

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
NEW YORK DISTRICT OFFICE
90 Church Street, Room 1301
New York, New York 10007
264-7161

EXPLANATION OF JUDICIAL REVIEW

Under Title VII if the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000 (e) *et seq.*, as amended, the Charging Party has the right to request judicial review[1] of the Commission's processes under the following circumstances:

1. After the Commission has administratively closed the case for lack of jurisdiction, untimely filing or for any other reason.

2. After the Commission has determined that there is no reasonable cause to believe that the alleged violations are true, and has dismissed the charge.

3. After the Commission has determined that there is reasonable cause to believe that the allegations are true, but is unable to affect a voluntary conciliation between the parties.

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[1] Please Note: In case the term "judicial review" is unclear, it simply means instituting an action in the proper federal district court. As a necessary prerequisite or condition for commencing such an action in this court, a Notice of Right to Sue is needed. This Notice may be obtained by a formal request in writing to the District Director in the office where the charge was filed, either from the Charging Party or the attorney representing the Charging Party asking that such Notice be forwarded. It is important that the party making such a request be aware that there is a 90-day limit on the time to file the charge in the court. This 90-day period begins to run from the date that the Notice of Right to Sue is received.

4. Anytime after 180 days (240 days if the complaint has been deferred to a state or local agency) have elapsed since the charge was formally filed with the Commission, whether or not any of the first three situations, outlined above, exist.

A change in our rule and regulations now require a NOTICE OF RIGHT TO SUE to be sent together with a *No Cause Determination;* same is hereby enclosed.

If you need any further information, contact the District Counsel of this office at (212) 264-7167.

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
NEW YORK DISTRICT OFFICE
90 Church Street, Room 1301
New York, New York 10007
264-7161

June 27, 1978

Mr. Rubin Kremer
c/o R. Garkawe
2120 Wallace Avenue, Apt. 2B
Bronx, N.Y. 10462

Re: Kremer v. Chemical Construction
Corporation
Charge No. 021-76-1526

Dear Mr. Kremer:

I am in receipt of your letter of June 15, last, in which you request reconsideration of the Determination rendered in the above-captioned matter.

Section 1601.19b(d) of the Commission's Procedural Regulations provides in pertinent part as follows:

> . . . The determination is final when issued; therefore request for reconsideration will not be granted. The Commission may, however, on its own motion, reconsider its determination at anytime and, when it does so the Commission shall promptly notify the aggrieved person or the person making the charge on behalf of the aggrieved person where applicable, and the respondent . . . of its subsequent decision or reconsideration.

I have reviewed the case file, and have spoken at length with the investigator, with particular emphasis upon the points contained in your communication, and have

concluded that the Determination as rendered is appropriate and correct in all respects. Therefore, in conformity with Section 1601.19b(d), your request for reconsideration is not granted.

Sincerely,

/s/ Arthur W. Stern
ARTHUR W. STERN
District Director

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RUBIN KREMER, PLAINTIFF

vs.

CHEMICAL CONSTRUCTION CORPORATION, DEFENDANT

COMPLAINT—Filed July 14, 1978

COMPLAINT AND MOTION FOR OTHER RELIEF

1. This action is brought pursuant to Title VII of the Civil Rights Act of 1964, as amended, for employment discrimination. Jurisdiction is specifically conferred on this Court by 42 U.S.C. § 20003-5. Equitable and other relief are also sought under 42 U.S.C. 2000e-5(g).

2. Plaintiff(s) is a citizen of the United States and resides at 2120 Wallace Ave. 2B, c/o R. Garkawe, New York, New York 10462, 212-892 1322.

3. Defendant(s) lives at, or its business is located at One Penn Plaza, New York, New York 10001.

4. The address at which I sought employment or was employed by the defendant(s) One Penn Plaza.

5. As nearly as possible, the alleged discriminatory acts occurred: 01, August, 1975.

6. As nearly as possible, I filed charges with the New York State Human Rights Commission or the N.Y.C. Commission on Human Rights regarding Defendant's alleged discriminatory conduct on: May 20, 1976.

7. As nearly as possible, I filed charges with the Equal Employment Opportunity Commission regarding Defendant's alleged discriminatory conduct on: 06, May, 1976.

8. The Equal Employment Opportunity Commission issued the *attached* Notice of Right to Sue letter which was *received* by me on 13, May, 1978.

(Note: Please attach a copy of Notice of Right to Sue letter to this Complaint.) (Only *1 copy* of letter is necessary.)

9. The acts I complain of in this suit, concern:

A. X Failure to employ me.

B. X Termination of my employment.

C. — Failure to promote me.

D. — Other acts (Specify): *On June 19, 1975 my performance rating was "Hold for his knowledge and skills". I was given a "below average" performance rating by E. Paul on July 29, 1975 in order to remove me from the Company on August 1, 1975. I was the only Jewish person in the Department. I was 58 of age. There was no lack of work in the piping analytical area. The people hired and rehired in August 1975, were 25-27 of age. In 1975-76 I applied for a job with Chemico, based on their advertisement in The New York Times. Chemico refused to hire me. Mr. Don Steenland Personnel Director of Chemico in his letter to the N.Y.S. Human Rights Division, of September 17, 1976 stated "We would not reemploy him merely for the sake of appearing his claims against Chemico.—When I apply for a job, every interested Company asked permission to contact the previous Company and the Supervisor, and then I receive a non-interest answer. It is my believe that the only reason is the "below average" performance rating and other black-mailing remarks.—The EEOC refused to examine witnesses listed in my brief to the H.R. Appeal Board of May 10, 77, and in my letter to the EEOC of June 15, 1978.*

10. Defendant's conduct is discriminatory with respect to the following:

A. — My race.

B. — My color.

C. — My gender (sex).

D. — My religion

E. — My national origin.

11. I believe that the Defendant or Defendants are still committing these acts against me. X Yes — No. They are not. (Check one).

12. A copy of the charge to the Equal Employment Opportunity Commission is attached to this complaint and is submitted as a brief statement of the facts of my claim.

13. If relief is not granted, Plaintiff will be irreparably denied rights secured by Title VII of the 1964 Civil Rights Act, as amended.

14. Plaintiff(s) has no adequate remedy at law to redress the wrongs described above.

WHEREFORE, Plaintiff(s) prays that the Court grant such relief as may be appropriate, including injunctive orders, damages, costs and attorney's fees.

/s/ Rubin Kremer
RUBIN KREMER

2120 Wallace Ave., 2B
c/o R. Garkawe
Bronx, New York, N.Y. 10462

(212)—892-1322

Enclosures:

1. Notice of Right to Sue
2. Copy of the charge to the EEOC and EEOC Affidavit of May 6, 1976
3. Copy of the letter to the EEOC of June 15, 1978
4. Copy of the letter from the EEOC of June 27, 1978
5. Copy of the letter to the EEOC of December 4, 1977
6. Copy of the letter to the EEOC of March 4, 1977
7. Copy of the letter to the EEOC of April 20, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

78 Civ. 3182 (LWP)

RUBIN KREMER, PLAINTIFF

—against—

CHEMICAL CONSTRUCTION CORPORATION, DEFENDANT

NOTICE OF MOTION TO DISMISS

S I R :

PLEASE TAKE NOTICE that, upon the annexed affidavit of Donald M. Cook, Esq., defendant Chemical Construction Corporation, by its undersigned attorneys, will move this Court, at the Courthouse thereof located at Foley Square, New York, New York, at 9:30 o'clock A.M. on the 20th day of September, 1978, or as soon thereafter as counsel may be heard, for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedures, dismissing this action on grounds of *res judicata*, or in the alternative, for an order granting summary judgment for defendant, pursuant to Rule 56, on grounds of *res judicata*.

Dated: New York, New York
September 5, 1978

LAYTON and SHERMAN

By: Layton and Sherman
(A Member of the Firm)
Attorneys for Defendant
50 Rockefeller Plaza
New York, New York 10020
(212) 586-4300

TO: RUBIN KREMER
Plaintiff *pro se*
c/o R. Garkawe
2120 Wallace Avenue, Apt. 2B
Bronx, New York 10462

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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78 Civ. 3182 (LWP)

RUBIN KREMER, PLAINTIFF

—against—

CHEMICAL CONSTRUCTION CORPORATION, DEFENDANT

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DONALD M. CROOK, being duly sworn, deposes and says:

1. I am an attorney at law, a member of the Bar of this Court and am an associate of the firm of Layton and Sherman, attorneys for defendant Chemical Construction Corporation ("Chemico") in this action. I am fully familiar with all facts and circumstances concerning this action.

2. I make this affidavit in support of Chemico's motion for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, dismissing this action on grounds of *res judicata*, or, in the alternative, for an order granting summary judgment for defendant pursuant to Rule 56, on grounds of *res judicata*.

3. Plaintiff Rubin Kremer brings this action pursuant to Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000(e)(5) and 2000(e)(5)(g), alleging that Chemico's "failure to employ me" and "termination of my employment" (Complaint ¶ 9) were "discriminatory with respect to . . . my religion [and] my national origin."

(Complaint ¶ 10). (A copy of the Complaint in this action, together with all of the exhibits thereto, are attached hereto as Exhibit "A".)

4. The issues raised by these allegations are in all respects identical to those which Mr. Kremer has previously unsuccessfully litigated against Chemico in the Courts of the State of New York. Indeed, the very documents annexed by Mr. Kremer to his Complaint in this action consist entirely of the various records and correspondence produced during the course of his prior litigation of these claims against Chemico.

5. On or about May 20, 1976, Mr. Kremer, a former employee of Chemico, filed a complaint (a copy of which is annexed hereto as Exhibit "B") with the New York State Division of Human Rights (the "Division") alleging that Chemico had unlawfully dismissed him and refused to rehire him on grounds of "religious creed" and "national origin." By a Determination and Order dated April 28, 1977 (a copy of which is annexed hereto as Exhibit "C"), the Division found that there existed "no probable cause" to support Mr. Kremer's allegations of discrimination. The documents and records attached to the Complaint were, in their entirety, before the Division and comprised the record in this case before the New York courts.

6. Mr. Kremer then, pursuant to N.Y. Exec. Law § 297(a) (McKinney's 1972), appealed the decision of the Division to the State Human Rights Appeal Board (the "Board"), which in an order dated November 25, 1977 (a copy of which is annexed hereto as Exhibit "D") fully affirmed the Determination and Order of the Division, finding, *inter alia*, that the Division's ruling had not been "arbitrary, capricious or an abuse of discretion."

7. Finally, by a Petition dated December 5, 1977 (a copy of which is annexed hereto as Exhibit "E"), Mr Kremer appealed the Order of the Board to the Appellate Division, First Department, of the Supreme Court

of the State of New York. By a unanimous decision and order dated February 27, 1978 (a copy of which is annexed hereto as Exhibit "F") the Court affirmed the determination of the Board. No appeal of this decision was taken to the Court of Appeals of New York.

8. Mr. Kremer had instituted the above-described proceedings before the New York administrative agencies and courts after first filing a Charge of Discrimination (a copy of which is annexed hereto as Exhibit "G") with the Equal Employment Opportunity Commission (the "EEOC") on or about May 6, 1976. On May 11, 1978, the EEOC issued a Determination and Notice of Right to Sue (a copy of which is annexed hereto as Exhibit "H") that "there is not reasonable cause to believe that the charge is true."

9. On August 18, 1978, Chemico noticed a motion, returnable on September 1, 1978, for an order enlarging the period of time in which it might answer or move with respect to the Complaint in this action to, and including, September 22, 1978. Because it was possible to prepare the present motion more quickly than earlier anticipated, Chemico can now submit it before September 22, 1978.

10. WHEREFORE, defendant Chemico respectfully requests that this motion to dismiss on grounds of *res judicata* be granted in all respects.

/s/ Donald M. Crook
DONALD M. CROOK

Sworn to before me this 5th day of September, 1978.

/s/ Dorothy Santucci
DOROTHY SANTUCCI
Notary Public

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 78 Civ. 3182

RUBIN KREMER, PLAINTIFF

v.

CHEMICAL CONSTRUCTION CORP., DEFENDANT

Dec. 7, 1978

OPINION AND ORDER

PIERCE, District Judge.

The plaintiff, Rubin Kremer, instituted this pro se action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The plaintiff alleges that the defendant, Chemical Construction Corp. ("Chemico"), both discharged him and failed to rehire him because of his religion and national origin. The defendant has moved for dismissal under Fed. R. Civ. P. 12(b) or, alternatively, for summary judgment under Rule 56 on the ground of res judicata. For the reasons that follow, the Court finds that the plaintiff is entitled to a de novo hearing on the claims presented to the Court as provided for in 42 U.S.C. § 2000e-5 and therefore denies defendant's motion.

FACTS

The plaintiff, a former employee of Chemico, alleges that he was terminated by the defendant on August 1, 1975, because of his national origin and his adherence to the Jewish religion. He also alleges that Chemico refused to rehire him later because of his national origin and religion. These alleged discriminatory acts are prohibited by both federal and state laws. 42 U.S.C. § 2000e

2(a)(1) (1970); N.Y. Exec. Law § 296(1) (McKinney Supp. 1977).[1]

The plaintiff filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC") on May 6, 1976, within the filing period. The EEOC referred the matter to the New York State Division of Human Rights ("HRD") as mandated in 42 U.S.C. § 2000e-5(c).[2] HRD is the state agency charged with the

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[1] 42 U.S.C. § 2000e-2(a) provides:

"It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin; . . . ."

N.Y. Exec. Law § 296(1) provides:

"It shall be an unlawful discriminatory practice: (a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or discharge from employment such individual. . . ."

[2] 42 U.S.C. § 2000e-5(c)

"In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided . . ."

Also see 29 C.F.R. 1601.12(b)(1)(iii, iv) (1977)

"The aggrieved party and any person filing a charge on behalf of an aggrieved party shall be notified, in writing, that the document which he or she sent to the Commission has been forwarded to the State or local agency . . . and that unless the Commission is notified to the contrary, on the termination of State or local proceedings, or after 60 . . . days have passed,

enforcement of state law prohibiting employment discrimination. That agency reviewed the complaint which alleged age as well as religious discrimination. New York's statute expressly prohibits age discrimination whereas Title VII does not. *Compare* 42 U.S.C. § 2000e-2 (a)(1) *with* N.Y. Exec. Law § 296(1) (McKinney Supp. 1977).

On March 4, 1977, while the matter was still pending before HRD, the plaintiff again requested EEOC to investigate his claim because of the state's delay in resolving his claims. HRD subsequently reached a determination on April 28, 1977 that the plaintiff's claims were meritless. Its determination was based on the findings that the plaintiff was not rehired because one employee who was rehired had greater seniority than the plaintiff, that another employee who was rehired filled a lesser position than that previously held by the plaintiff, and that the plaintiff's creed and age were not factors considered in Chemico's selection. HRD did not, however, make an express finding that his creed and age were not factors considered by Chemico in its decision to discharge him. On administrative appeal, HRD's determination was affirmed on November 25, 1977 by the State Human Rights Appeals Board on the grounds that HRD's findings were not arbitrary or capricious.

The plaintiff then appealed the decision to the New York State Supreme Court, Appellate Division, First Department, under N.Y. Exec. Law §§ 296-298. That intermediate appellate court affirmed the decision on February 27, 1978. The matter was not appealed further.

On May 11, 1978, the EEOC reviewed the HRD's findings, the complaint, and the record and determined that

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whichever occurs first, the Commission will consider the charge to be filed with the Commission and commence processing the case. . . ."

"Upon notification of the termination of State or local proceedings or the expiration of 60 (or 120) days, whichever occurs first, the Commission will consider the charge to be filed with the Commission and will commence processing the case."

there was no reasonable cause to believe that the plaintiff's claims were valid. It then issued a notice of right to sue. Plaintiff subsequently instituted this action pro se, and requested a de novo trial under Title VII.

DISCUSSION

The issue presented to the Court by the instant motion to dismiss the complaint or, in the alternative, for summary judgment is whether the prior state appellate court review of the state agency's action under state law bars a federal action under Title VII.

Chemico urges this Court to adopt the approach followed in *Mitchell* v. *National Broadcasting Co.*, 553 F.2d 265 (2d Cir. 1977) and dispose of this motion similarly. In *Mitchell*, the plaintiff had instituted an action under 42 U.S.C. § 1981, but prior to instituting the federal action the plaintiff had brought an action under the N.Y. Human Rights Law with HRD. Only after she was denied relief and after instituting an appeal from HRD's decision with the Appeals Board did that plaintiff seek federal relief by filing a charge of discrimination with the EEOC. The EEOC issued a finding of no probable cause after HRD's determination was affirmed by the Appeals Board and the Appellate Division.

The plaintiff then instituted an action under § 1981 in federal court, but the action was dismissed on the ground of res judicata. On appeal, the Court of Appeals held that the federal action was indeed barred by res judicata because the plaintiff had sought state court review of the state agency determination. *Id.* at 276. However, it expressly reserved judgment on the question of whether the principle of res judicata would bar a similar action under Title VII. *Id.* at 275 n.13.

In comparison, the plaintiff in this action initially filed a complaint with the EEOC, was referred to HRD, and resumed his request that the EEOC investigate his charges prior to HRD reaching its conclusion. Like the complaint in *Mitchell*, the plaintiff, commenced this action in federal court after failing in his appeal to the

state Appellate Division regarding the Appeals Board's affirmance of the HRD determination.

The similarity of the facts of the instant action to those in *Mitchell*, Chemico contends, is sufficient to justify a ruling similar to that in *Mitchell*, particularly since Title VII does not require exhaustion of state judicial remedies prior to instituting federal claims and since the plaintiff chose not to appeal the Appellate Division's affirmance to the New York State Court of Appeals. While Title VII does require that the EEOC defer complaints to HRD, 42 U.S.C. § 2000e-5(c) (1970), it does not require that complainants exhaust state judicial remedies before seeking federal relief. On the contrary, Title VII allows the filing of a complaint with the EEOC 60 days after proceedings are initiated under state law. *Id.* Chemico contends that if the plaintiff had sought federal relief immediately after the ruling from the HRD and from the State Appeals Board rather than appealing to the state court, his right to a de novo federal trial would have been preserved. *See, Voutsis* v. *Union Carbide Corp.*, 452 F.2d 889 (2d Cir.), *cert. denied*, 406 U.S. 918, 92 S.Ct. 1768, 32 L.Ed.2d 117 (1971); *Batiste* v. *Furnco Construction Corp.*, 503 F.2d 447 (7th Cir.), *cert. denied*, 420 U.S. 928, 95 S.Ct. 1127, 43 L.Ed.2d 399 (1975).

In determining that state court review barred a subsequent federal court action under § 1981, the Court in *Mitchell* stressed that § 296 of the New York Executive Law is at least as broad as the federal constitution and civil rights laws in prohibiting discrimination in employment. 553 F.2d at 269-70, that the issues addressed in the state proceedings were the same as those before the district court, *id.* at 270, that the standard for evaluating the plaintiff's claim under state law is comparable to that for evaluating a summary judgment motion in the federal courts, *id.* at 271, and that the New York state courts are not less capable than federal courts in resolving the legal sufficiency of a complaint or less sensitive to claims under the State Human Rights Law which

may also be actionable under federal statute. *Id.* at 276. The issue to be determined here is whether these considerations compel a finding of a similar bar of actions brought under Title VII.[3]

The principles of collateral estoppel and res judicata are made applicable to federal courts with respect to prior state court judgments by 28 U.S.C. § 1738. That statute obligates the federal courts to give full faith and credit to judgments of state courts of competent jurisdiction.[4] The federal court, however, need only give that state judgment the same effect as it would be given in the state in which it was rendered. *Mitchell* v. *National Broadcasting Co.*, 553 F.2d at 274.[5] Ordinarily, this requires an analysis of the res judicata effect of the state court proceedings within the state and an examination of the local law of res judicata and collateral estoppel. *Winters* v. *Lavine*, 574 F.2d at 52 (2d Cir. 1978).

While section 1738 mandates an analysis and application of the state doctrines of res judicata and collateral estoppel, other considerations must also be evaluated.

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[3] A review of decisions of sister courts in other circuits has revealed sharply conflicting opinions. *Compare Beck* v. *Mather*, 417 F. Supp. 648 (W.D. Va. 1976) (prior state court dismissal not res judicata) with *Bennun* v. *Board of Governors*, 413 F. Supp. 1274 (D.N.J. 1976) (prior state court determination is res judicata).

[4] 28 U.S.C. § 1738 extended the Full Faith and Credit provisions of the U.S. Constitution Article 4, § 1 to all courts, federal as well as state. *Davis* v. *Davis*, 305 U.S. 32, 40, 59 S.Ct. 3, 6, 83 L.Ed. 26, 29 (1938). *Also see Winters* v. *Lavine*, 574 F.2d 46, 54 (2d Cir. 1978); *American Manufacturers Mut. Ins. Co.* v. *Rozands*, 462 F.2d 688, 690 (5th Cir.), *cert. denied*, 409 U.S. 1040, 93 S.Ct. 524, 34 L.Ed.2d 489 (1972).

[5] *But see* Theis, *Res Judicata in Civil Rights Act Cases: An Introduction to the Problem*, 70 Nw. U.L. Rev. 859, 876 "Although section 1738 counsels the federal judge to resolve all res judicata problems in all cases as would a state judge, this admonition is unrealistic and impossible when the federal judge exercises a concurrent jurisdiction granted for special reasons."

As the *Mitchell* court noted, even if a state court's determination had a res judicata or collateral estoppel effect on other courts of that state, federal courts are not always bound by such prior state decisions. " 'Other well-defined federal policies, statutory or constitutional, may compete with those policies, underlying [28 U.S.C. §] 1738 [which provides that the federal courts give full faith and credit to judgments of state courts of competent jurisdiction].' " *Id.* at 274 (citing *American Mannex Corp.* v. *Rozands*, 462 F.2d 688, 690 (5th Cir.), *cert. denied*, 409 U.S. 1040, 93 S.Ct. 524, 34 L.Ed.2d 489 (1972)). Especially in civil rights actions, the res judicata and collateral estoppel requirements of § 1738 have not been rigidly applied. *See Mitchell, supra* at 274; *McCune* v. *Frank*, 521 F.2d 1152, 1156 n.10 (2d Cir. 1975); *also see* discussion in *Winters, supra* at 56. But the mere fact that a federal civil rights action is involved is not sufficient reason to deny a state court determination the full faith and credit required by § 1738. *Mitchell* v. *National Broadcasting Co., supra.*

Recent decisions in this circuit have supported the conclusion that state court determinations have res judicata or collateral estoppel effect on subsequent federal civil rights actions. *Winters* v. *Lavine, supra; Mitchell* v. *National Broadcasting Co., supra. Winters* was an action under 42 U.S.C. § 1983 (*accord Hammer* v. *Town of Greenburgh*, 440 F. Supp. 27 (S.D.N.Y. 1977)) and *Mitchell* was instituted under 42 U.S.C. § 1981. Several distinctions exist, however, between the statutes under which those cases were tried and Title VII. Under Title VII, the statutory prerequisite for instituting an action in federal court is that the complainant first submit his claim to state and federal agencies. 42 U.S.C § 2000e-5, *supra.* This requirement is not present under § 1981 or § 1983. The purpose of this requirement is to permit the state agency to attempt to resolve the matter under state law through voluntary conciliation and persuasion. *Alexander* v. *Gardner-Denver*, 415 U.S.

36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147, 156 (1974); 29 C.F.R. 1601-12(a) (1977). Furthermore, Title VII provides for a de novo hearing by a federal court once the statutory prerequisites have been met. The Court must be mindful of these distinctions and their implications in evaluating the applicability of the holdings in *Winters* and *Mitchell* to the action at bar and in assessing the federal policies embodied in Title VII.

A review of the history of Title VII indicates that Congress intended the policy against discrimination, as manifested in the Civil Rights Act of 1964, be given the highest priority. *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (per curiam). "Consistent with this view, Title VII provides for consideration of employment discrimination claims in several forums .... And, in general, submission of a claim to one forum does not preclude a later submission to another. Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 47-49, 94 S.Ct. at 1019-1020, *accord*, 29 C.F.R. 1601.12(a) (1977). Accordingly, Title VII actions should not be subject to the collateral estoppel effects of section 1738 where the result would be the possible frustration of the congressional objectives embodied in Title VII, to wit, the availability of separate federal and state remedies and the independent adjudication of federal claims.

An earlier Title VII case involving circumstances similar to those presented in the action at bar discussed these policy considerations. In *Benneci* v. *Dep't of Labor*, 388 F. Supp. 1080 (S.D.N.Y. 1975), the plaintiff claimed that the defendant had engaged in unlawful employment discrimination and discriminated against him because of

his religion and national ancestry in violation of New York's Human Rights Law. After HRD determined that there had been no unlawful discriminatory practice, he appealed to the Appeals Board which affirmed. Benneci then appealed to the state appellate court which also affirmed. Having failed to secure relief from the state, he filed a complaint with the EEOC. When the EEOC determined that there was no reasonable cause to believe that an unlawful practice had been engaged in, plaintiff brought his action in federal court.

In refusing to give the state court's affirmance res judicata effect, the district court judge discussed the congressional objectives embodied in Title VII. In his opinion, Judge Knapp cited the Supreme Court's unanimous decision in *Alexander* v. *Gardner-Denver Co., supra,* wherein it was noted that the purpose of Title VII was to assure equality of employment opportunities through cooperation and voluntary compliance. Title VII incorporates a procedure whereby existing state and local agencies as well as the EEOC would have an opportunity to settle disputes before the complainant was permitted to commence an action in federal court. The court in *Benneci* reasoned that to grant defendant's motion for summary judgment because the plaintiff had sought to comply with these procedures would defeat the general purpose of the statutory scheme. 388 F. Supp. at 1081. Furthermore, where the complainant has manifested a preference for the federal forum by initiating his action with EEOC rather than the state agency, he may be less inclined to actively and fully pursue his state claim, as envisioned by the statutory scheme, or to seek review of arbitrary state agency actions, if a possible loss of his federal claim would result. This statutory scheme is unique to Title VII actions and manifests Congress' intent that there be an initial resort to state remedies. A bar of a federal action because of collateral estoppel may well frustrate this congressional purpose. Consequently, a complainant's resort to state court review should not bar

a Title VII action as it would under other federal civil rights statutes.

A further reason for distinguishing an action under Title VII from actions under other federal civil rights statutes is that Title VII expressly provides for a de novo hearing by a federal court. Although state courts may be said to be as capable of evaluating claims of discrimination as federal courts, where the reviewing state court does not have plenary power to try the matter anew, the barring of an independent federal action on grounds of collateral estoppel would have the effect of limiting the availability of a de novo hearing. Such a holding would impliedly restrict the express provision for a second independent hearing to those instances where the state proceedings had been terminated without state court review. There being no limitation of this nature on the availability of a de novo hearing imposed by the Congress, the insertion of a qualification by judicial fiat is unwarranted.

CONCLUSION

While *Benneci* was decided prior to the decision in *Mitchell*, the reasoning of *Benneci* is consistent with the later analysis of the Second Circuit Court of Appeals in *Mitchell*. The policy embodied in Title VII was intended to be effectuated by the entire procedure set forth in § 2000e-5 including the provision for a second, independent federal hearing. Truncating the procedure on the grounds of res judicata under these circumstances is not mandated by *Mitchell* and would be contrary to the apparent intent of Congress.

Accordingly, the defendant's motion to dismiss or, alternatively, for summary judgment is denied.

SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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78 Civ. 3182 (LWP)

RUBIN KREMER, PLAINTIFF

-against-

CHEMICAL CONSTRUCTION CORPORATION, DEFENDANT

ANSWER—Filed March 1, 1979

Defendant Chemical Construction Corporation, by its undersigned attorneys, for its answer to the Complaint of plaintiff Rubin Kremer:

1. Admits the allegations contained in Paragraphs 1, 3, 4, 6, and 12 of the Complaint, except as to Paragraph 12, denies knowledge or information sufficient to form a belief as to whether said charge is submitted as a brief statement of the facts of plaintiff's claim.

2. Denies the allegations contained in Paragraphs 9, 10, 13 and 14 of the Complaint.

3. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraphs 2, 5, 7, 8 and 11 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

4. The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

5. This action is barred by the principles of *res judicata* and collateral estoppel.

WHEREFORE, defendant respectfully requests that the Complaint be dismissed and that it be awarded such other and further relief as to the Court may appear just, including its costs and disbursements of this action.

Dated: New York, New York

February 27, 1979

LAYTON AND SHERMAN

By /s/ David Loeffler
(A member of the firm)

Attorneys for Defendant
50 Rockefeller Plaza
New York, New York 10020

(212) 586-4300

Affidavit of Service by Mail (omitted in printing)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 78 Civ. 3182

RUBIN KREMER, PLAINTIFF

v.

CHEMICAL CONSTRUCTION CORP., DEFENDANT

September 20, 1979

As Amended October 2, 1979

OPINION

SOFAER, District Judge:

This is an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Plaintiff Kremer claims he was discharged and has not been rehired by defendant Chemical Construction Corp. (Chemico) because of his religion (Jewish) and national origin. He filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) on May 6, 1976. EEOC referred the matter to the New York State Division of Human Rights (NYHRD), as mandated. 42 U.S.C. § 2000e-5(c). NYHRD concluded that plaintiff had failed to establish probable cause to believe that Chemico had engaged "in the unlawful discrimination practice complained of," and made findings that plaintiff had not been rehired for lawful reasons.[1] No ex-

[1] The determination recited:

> The record shows that this complainant was not rehired by the respondent employer because one employee with greater seniority was chosen.
>
> The other person that was rehired, [sic] filled a lesser position than that held by complainant.
>
> Complainant's creed, or age, was not a factor in these selections.
>
> The complaint is therefore ordered dismissed, and the file is closed.

"Determination after Investigation," NYHRD, April 28, 1977, Exhibit C, Defendant's Motion to Dismiss, Sept. 5, 1978.

press findings were made with respect to Kremer's initial discharge.[2] The papers filed by Kremer indicate, however, that the evidence of discrimination on rehiring is more substantial than the evidence advanced on the illegality of the initial discharge. The NYHRD seems therefore to have impliedly rejected plaintiff's additional claims. On November 25, 1977, the NYHRD's determination was upheld by its Appeal Board as "not arbitrary, capricious or an abuse of discretion."

Plaintiff then appealed to the Appellate Division, First Department, for a judgment pursuant to § 298 of the Human Rights Law and pursuant to CPLR Article 78. He offered all the evidence and arguments there that he has most recently advanced in this court. The decision was unanimously "confirmed" by five Justices on February 27, 1978. Plaintiff again petitioned the EEOC for relief. On May 11, 1978, the EEOC found no probable cause to believe plaintiff's claims, but it confirmed (on the usual printed form) a right to "pursue this matter further, if so desired, by filing a private action in Federal District Court within 90 days."[3] This action followed.

Chemico has argued from the outset of this litigation that plaintiff's Title VII claims are barred by res judicata. Defendant formally moved for dismissal on September 5, 1978, basing its argument primarily on *Mitchell* v. *National Broadcasting Co.*, 553 F.2d 265 (2d Cir. 1977). *Mitchell* was an action under 42 U.S.C. § 1981 by a black woman claiming racial discrimination by her employer. Like Kremer, she was denied relief by the NYHRD, unsuccessfully sought review by its Appeal Board, and then applied to the Appellate Division, First Department, which unanimously confirmed. *Mitchell* thereafter applied to the EEOC. After the EEOC found no probable cause, she sued in federal

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[2] Id., Exhibit C.

[3] Id., Exhibit H.

court under 42 U.S.C. § 1981. The only significant difference, therefore, between *Mitchell* and the present case is that plaintiff Kremer sues in the federal courts under Title VII, whereas Mitchell sued under § 1981.

The Second Circuit held in *Mitchell* that a federal action under § 1981 was barred under principles of res judicata. In so holding, the court found it necessary to distinguish its earlier decision in *Voutsis* v. *Union Carbide Corp.*, 452 F.2d 889 (2d Cir. 1971), *cert. denied*, 406 U.S. 918, 92 S.Ct. 1768, 32 L.Ed.2d 117 (1972), which held that resort to a state agency to test a racial discrimination claim does not bar a subsequent federal suit under Title VII.[4] Because the plaintiff in *Mitchell* had gone one step beyond the state agency level by seeking limited review in the state courts by way of an Article 78 proceeding, a majority of the Second Circuit panel concluded that the sate decision should be accorded the same res judicata effect it would have in the New York State courts.[5]

The plaintiff in *Mitchell*, though suing under § 1981, argued that to apply res judicata to her case would conflict with the legislative scheme of Title VII. But the court disagreed. The federal interest in encouraging deferral of civil rights claims to state adjudication applied only, the court found, to state agencies where conciliation

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[4] In *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), the Supreme Court cited the *Voutsis* decision with approval, noting that "[m]ost courts have recognized that the doctrine of election of remedies does not apply to suits under Title VII", at 49 n. 11, 94 S.Ct. at 1020. *See also Cooper* v. *Philip Morris, Inc.*, 464 F.2d 9 (6th Cir. 1972).

[5] Because *Mitchell* sought relief in the federal court on the same grounds as the state court, the court reasoned that she had had her "day in court." The fact that no opportunity for a formal evidentiary hearing had been afforded did not, in the court's view, preclude application of res judicata so long as there was an identity of issues and the plaintiff had had the right to appear and an opportunity to be heard. 553 F.2d at 271.

of civil rights claims is attempted. "Once review of a state agency determination is sought in the state courts, however, these considerations disappear." 553 F.2d at 275. This result, the court stated, allows state agencies to apply their expertise in discrimination claims and at the same time affords a federal remedy to claimants who choose to sue in the federal courts rather than seek review in the state courts. *Id.* at 265.

Judge Feinberg dissented in *Mitchell*. He concluded that if res judicata applied in an action under 42 U.S.C. § 1981, it should also apply to a claim under Title VII, a result he found unacceptable. He reasoned that, since Congress had provided for a de novo hearing of all Title VII cases in the federal courts after both state and federal agency determinations, it made no sense to deprive a complainant of de novo because he or she pursued an additional, limited review in the state courts. He noted that Congress had provided in civil rights cases for considerable duplication and overlapping of remedies, and that this legislative purpose should not be overridden by judicial resort to the normal but inapposite policy against repetitious litigation. *Id.* at 277-80; *see* 28 U.S.C. § 1738.

Despite *Mitchell*, defendant's motion to dismiss in this case was denied by Judge Lawrence W. Pierce on December 7, 1978.[*] Judge Pierce essentially adopted Judge Feinberg's reasoning in *Mitchell*, but concluded that the specific statutory grant of de novo federal review in Title VII justified distinguishing, for res judicata purposes, cases under Title VII from cases under the other civil rights statutes. He agreed also with Judge Whitman Knapp's opinion in *Benneci* v. *Department of Labor*, 388 F.Supp. 1080 (S.D.N.Y.1975). To apply res

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[*] Further indication of the Second Circuit's attitude on repetitious litigation was provided by the intervening decision in *Winters* v. *Lavine*, 574 F.2d 46 (2d Cir. 1978), applying collateral estoppel in an action under 42 U.S.C. § 1983.

judicata to Title VII cases, Judges Pierce and Knapp concluded, would defeat the general purposes of the statutory scheme as construed by a unanimous Supreme Court in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). "Such a holding would impliedly restrict the express provision for a second independent hearing to those instances where state proceedings had been terminated without state court review. There being no limitation of this nature on the availability of a de novo hearing imposed by Congress, the insertion of a qualification by judicial fiat is unwarranted." *Kremer* v. *Chemical Construction Co.*, 464 F.Supp. 468, 473 (S.D.N.Y.1978).

On June 12, 1978, however, the Second Circuit extended the *Mitchell* rule to Title VII cases. In a *per curiam* opinion, it held that res judicata would bar a Title VII claim where the plaintiff had previously sought state court review on the same question presented to the federal courts. The panel saw "no reason to distinguish between Section 1981 and Title VII for res judicata purposes." Without discussion of the de novo review requirement of Title VII, *Mitchell* was deemed to control. "The crucial factor is that appellant chose to submit her case to the state *courts* for review and she cannot now relitigate the same issues in federal court." *Sinicropi* v. *Nassau County*, 601 F.2d 60 at 62 (2d Cir. 1979). (Emphasis in original.) Judge Feinberg, who dissented in *Mitchell*, agreed its reasoning required dismissal of Title VII cases, as he had predicted.

Sinicropi permits no choice but to dismiss plaintiff's complaint in this case on grounds of res judicata. Plaintiff urges what he regards as distinguishing features: perfunctory treatment by the NYHRD and an order by the Appellate Division that misleads by reciting that plaintiff appeared and argued in his behalf. These deficiencies, however, are less substantial than—though similar to—the deficiencies raised by the plaintiff in *Mitchell*. See 553 F.2d at 268 (lack of witnesses, no cross exami-

nation, no counsel). Nor is it significant that the NYHRD's opinion expressly refers only to the plaintiff's claim based on defendant's failure to rehire him; the papers indicate that both the agency and the state court were presented with all aspects of plaintiff's claim of religious discrimination—identical to the claim presented in this court—and they denied relief.

To submit to *Mitchell* and *Sinicropi*, however, is not to agree with them. The *Mitchell* majority's conclusion that Title VII's de novo review is satisfied by a combination of an agency finding of no probable cause coupled with Article 78 review seems fanciful. No amount of judicial explication can alter the reality that a litigant who pursues his civil rights claim in a state court with limited powers of review loses his statutory right to full review in the federal courts. This disparity in remedial opportunity is merely obfuscated by the assertion that agency consideration of probable cause coupled with limited Article 78 review is equivalent to a summary judgment proceeding in federal court and thus satisfies the de novo review requirement. It is well settled that in considering a Title VII claim a federal district court is not bound by administrative findings of fact. *Chandler* v. *Roudebush*, 425 U.S. 840, 844-45, 96 S.Ct. 1949, 48 L.Ed.2d 416 (1976). A Title VII trial may therefore encompass anything reasonably within the scope of an EEOC investigation. *See* Comment, *T'was a Nibble Not a Bite: Res Judicata and Section 1981—Mitchell* v. *National Broadcasting Co.*, 53 N.Y.U.L.Rev. 187, 204-05 (1978). Whether the district court decides the claim on a motion for summary judgment or after a full trial, it is entitled to request additional affidavits and evidence and, if necessary, to hold an evidentiary hearing. *See generally* Wright & Miller, *Federal Practice and Procedure: Civil* § *2721* (1973). By contrast, the New York Appellate Division, like most appellate courts, is limited to the record of facts gathered and evidence presented in the agency proceedings. Comment, *State Appellate Court Judgment on*

Employment Discrimination is Res Judicata in Subsequent Federal Action Under Section 1981 of the Civil Rights Act of 1866, 62 Minn.L.Rev. 987, 1006 (1978). As a result, the appellate court determination is subject to all the procedural infirmities of the administrative proceeding.

Even if state agency and appellate court review were considered sufficiency analogous to federal summary judgment in the abstract, res judicata would still appear an inappropriate mechanism to bar Title VII claims in the federal courts. As the Second Circuit stated in *Voutsis*, *supra*, "[a] federal claim allows the district court to conduct a 'full scale inquiry into the charged unlawful motivation in employment practices' ", 452 F.2d at 893, *quoting Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 715 (7th Cir. 1969). Such a full scale inquiry will often call for a trial on the merits, including independent fact-finding by the federal courts. The *Mitchell* majority correctly argued, of course, that a federal court is empowered to use a summary judgment procedure in all cases where no genuine issue of material fact is presented; in such cases the issues considered in the federal review would be quite similar to the issues considered when a state court "confirms" as reasonable an agency's dismissal for lack of probable cause. But there is a critical difference between the authority of the New York and federal courts in dealing with Title VII issues. A federal court is *permitted* to make a summary judgment disposition of an employment discrimination case. By contrast, the New York Appellate Division in an Article 78 proceeding is *restricted* to using a proceeding similar to summary judgment; it has no authority to determine whether summary judgment is, in a given case, preferable to a full judicial trial on the merits.[7] For this reason, the issues

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[7] *See generally* Comment, *Civil Rights—Civil Procedure: State Appellate Court Judgment on Employment Discrimination is Res Judicata in Subsequent Federal Action Under Section 1981 of the Civil Rights Act of 1866*, *supra*, at 988 nn. 5 & 6. The Appeal Board reviews dismissals for lack of probable cause only to deter-

presented before the state court in an Article 78 proceeding and those before the federal court under Title VII are necessarily dissimilar, thus making the application of res judicata inappropriate. Given the express mandate in Title VII for federal *de novo* review, the federal court would appear obliged to determine independently the nature and extent of review necessary to protect a claimant from employment discrimination. *Mitchell* and *Sinicropi* foreclose the federal courts from considering this important question.[8]

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mine whether the action of the NYHRD was "arbitrary and capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion." *Mayo* v. *Hopeman Lumber & Mfg. Co.*, 33 A.D.2d 310, 313, 307 N.Y.S.2d 691, 694, *appeal dismissed*, 26 N.Y.2d 962, 311 N.Y.S.2d 5, 259 N.E.2d 477 (1970). Even if the Board determines that there is a genuine factual dispute over a key issue, it may not reverse the NYHRD's dismissal for lack of probable cause. *See Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *State Div. of Human Rights*, 48 A.D.2d 391, 370 N.Y.S.2d 96 (1975) (per curiam). Nor is it empowered to find new facts. *See State Div. of Human Rights* v. *Columbia Univ.*, 39 N.Y.2d 612, 616, 385 N.Y.S.2d 19, 21, 350 N.E.2d 396, 398 (1976), *cert. denied*, 429 U.S. 1096, 97 S.Ct. 1112, 51 L.Ed.2d 543 (1977).

The Appellate Division's scope of review in an Article 78 proceeding has been held to be no broader than that of the Appeal Board. *See Mize* v. *State Div. of Human Rights*, 33 N.Y.2d 53, 57, 349 N.Y.S.2d 364, 367-68, 304 N.E.2d 231, 233 (1973). Thus, in reviewing the state agency determinations, it seems that the Appellate Division can at most reverse and remand for a hearing or further investigation by the agency. *See Mitchell, supra*, 553 F.2d at 272 n. 9, *citing Mayo* v. *Hopeman Lumber & Mfg. Co., supra*.

In justifying application of res judicata in *Mitchell*, the majority apparently relied on the fact that Second Circuit courts have on occasion given res judicata effect to Article 78 judgments. 553 F.2d at 272 n. 9. None of the cases cited by the majority, however, involved the resolution of employment discrimination or similar claims where Congress expressly provided for *de novo* federal court review.

[8] This court concedes that it may not always be inappropriate for a federal court to give res judicata effect to a state court's disposition of an employment discrimination claim. As two com-

A primary concern of the *Mitchell* majority was the need to enhance comity between the state and federal courts. Yet, as the *Mitchell* majority concedes, comity in our federal system must always begin with a proper implementation of our national legislature's will. Otherwise, the concept might be used to create a preference for adjudicating at least some types of federal claims in state rather than federal court. Where Congress has "long evinced a general intent to accord parallel or overlapping remedies against discrimination," *Alexander* v. *Gardner-Denver Co., supra*, 415 U.S. at 47, 94 S.Ct. at 1019, a preference for state resolution of such claims seems especially inappropriate. Furthermore, comity has generally been understood to require deference to state decisions based on the same scope of review applied in comparable federal proceedings. It seems a strange version of comity to require a federal court to relinquish an obligation to grant de novo review on the ground that a state court has granted limited review of a state agency decision. One wonders, moreover, why comity will be served if, as seems likely, individuals with civil rights claims will strive to avoid the state courts in order to preserve their rights to federal forum.

The *Mitchell* majority also wrote of the "interests of judicial husbandry," and "the equity of protecting opposing parties . . . from vexatious duplicative litigation," 553 F.2d at 276-277, *quoting from Thistlewaite* v. *City of New York*, 362 F.Supp. 88, 92 (S.D.N.Y. 1973), *aff'd*, 497 F.2d 339 (2d Cir.), *cert. denied*, 419 U.S. 1093, 95

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mentators have persuasively argued, res judicata effect might properly be accorded when the state proceedings included a trial on the merits, or at least involved summary disposition where there was a possibility of full trial on the merits. Comment, *Civil Rights—Civil Procedure: State Appellate Court Judgment on Employment Discrimination is Res Judicata in Subsequent Federal Action Under Section 1981 of the Civil Rights Act of 1866, supra*, at 1012; Comment, *T'was a Nibble Not a Bite: Res Judicata and Section 1981, supra*, at 214.

S.Ct. 686, 42 L.Ed.2d 686 (1974). Even assuming an adequate basis exists for judicially revising the apparent legislative judgment as to where the balance should be struck on these interests, do considerations of judicial administration and equity truly support the application of res judicata in Title VII cases?

Title VII plaintiffs will still initially seek relief before the NYHRD because the federal statute requires them to do so. Some will still seek review in the state courts on state law grounds, carefully avoiding any mention of their federal claims even though they are before a tribunal compentent to review those claims. Most will avoid the state courts entirely, thus encouraging further deterioration of the state agency process due to much less frequent state court supervision. Furthermore, by discouraging state court review of agency decisions, *Mitchell* and *Sinicropi* may well serve to increase the number of discrimination cases brought in the federal courts. Those plaintiffs who, until *Mitchell* and *Sinicropi*, were satisfied with the handling of their claims by the state courts and sought no federal review will, after those decisions, pursue their claims in federal courts at the outset.[9] Federal courts who hear these claims will no longer have the benefit of state court decisions, which have often been of assistance.

As for the equitable consequences of *Mitchell* and *Sinicropi*, they may create far more unfairness than they

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[9] *Cf. Alexander* v. *Gardner-Denver Co., supra*, where the Supreme Court expressed similar concerns in holding that federal courts should not give res judicata effect to state arbitration determinations. The Court noted that to hold otherwise

> might adversely affect the arbitration system as well as the enforcement scheme of Title VII. Fearing that the arbitral forum cannot adequately protect their rights under Title VII, some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less. 415 U.S. at 59, 94 S.Ct. at 1025.

avoid, and proper alternative means for avoiding vexatious, duplicative litigation seem available. First, it seems clear that many civil rights claimants have been misled by prior court decisions, such as *Voutsis*, into believing they could seek limited state court review without losing access to the federal courts. Indeed, in cases such as the present one, the state and federal agencies handling civil rights claims have uniformly assumed that federal review remained available under Title VII irrespective of prior proceedings. For example, after Mr. Kremer had gone to the state agency, sought state review, and then federal agency consideration, the EEOC issued a letter stating that he had a "right to sue" in federal court. There seems little equity in imposing a rule of forfeiture upon applicants such as Kremer under circumstances where even the expert agencies could not have anticipated one. Granted that the unfairness of applying res judicata to Title VII cases is lessened with respect to complainants who seek state court review after *Sinicropi*; yet the fact remains that the individuals who sought review in state court prior to *Sinicropi* have lost their right to federal court consideration of an important federal claim without notice or fault.[10]

The *Mitchell* and *Sinicropi* decisions will also have inequitable results in future cases. Undoubtedly some individuals will continue to seek review of their federal claims in state courts. These will generally be the uninformed parties who are commonly seen as pro se plaintiffs in civil rights cases. Whatever increase is attained in judicial efficiency through finalizing state court decisions is likely to be at the expense of these plaintiffs

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[10] The unfairness of applying *Sinicropi* to plaintiffs such as Kremer was brought home to this court when Mr. Kremer was told his complaint had to be dismissed. He was obviously shocked to discover that he had no right to federal review. He complained that he had gone through all the procedures he had been told to go through, but had never obtained a hearing on his claim.

who will not know they should avoid our sister courts. On the other hand, civil rights defendants will not really be spared vexations, duplicative litigation by *Mitchell* and *Sinicropi*. Knowledgable plaintiffs need dispense with only one of the several stages of litigation available to them, one which to defendants must be the least burdensome stage of all, i.e., a limited review in which the state agency joins the defendant in opposing the plaintiff's contentions.

Greater relief for vexed defendants in Title VII cases is certainly an objective the Circuit Court should strive to secure. Cases brought by individual plaintiffs seem particularly burdensome, and most often meritless. Devices are potentially available, however, that would be more effective in deterring vexatious suits and fairer to plaintiffs than applying the res judicata doctrine. Two particularly promising measures would be to encourage federal district judges to use their power to grant summary judgment on the merits, and to permit them greater authority in frivolous cases to grant costs and counsel fees against the losing plaintiff.

The right to a *de novo* review should not exempt civil rights claimants from the usual requisites of federal litigation, including the need to allege facts sufficient to create a genuine issue of fact as well as a legal theory upon which relief may be granted. We are perhaps too reluctant to give full weight at the pleading stage to the practical reality that, in light of the plaintiff's burden of proof, discrimination cases based essentially on the plaintiff's feelings or suspicions often fail to raise issues of fact worth litigating.[11] Indeed, greater use of summary judgment in employment discrimination cases finds support in the *Mitchell* decision itself. If the court there

[11] One commentator persuasively argues that, where the moving party does not have the trial burden of proof, the summary judgment evidentiary standard should be relaxed. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 Yale L.J. 745 (1974).

was willing to give full faith and credit to a state procedure which merely resembles federal summary judgment, it should be even more prepared to affirm a federal district court's summary disposition of a Title VII claim, especially since the federal court is free to consider the propriety of a full trial on the merits.

We naturally resist imposing costs and fees on individuals who already carry with them, however unjustifiably in the law's eyes, a feeling of having been greatly wronged. Yet it is here that the courts must show courage and ingenuity. Instead of precluding suits under judicial doctrines such as res judicata, we should use statutorily granted powers to tax costs and fees in cases we have concluded are meritless. *See* 42 U.S.C. § 2000e-5(k). The Supreme Court recently confirmed the propriety of awarding attorney's fees to a Title VII defendant who prevails on the merits. *Christianburg Garment Co.* v. *EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). Although the Court concluded that a more stringent standard should apply to prevailing defendants than would apply to prevailing plaintiffs, the standard articulated by the Court for prevailing defendants seeking attorney's fees is far less stringent than many lower federal courts had assumed. The Supreme Court stated: "[A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." 434 U.S. at 421, 98 S.Ct. at 700. With this new standard, the assessment of attorney's fees is now available as a potentially effective device for protecting defendants from the burdens of meritless civil rights claims.

The motion to dismiss is granted, and the complaint is dismissed, without costs to either side.

SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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78 Civil 3182 (ADS)

RUBIN KREMER, PLAINTIFF

—against—

CHEMICAL CONSTRUCTION CORP., DEFENDANT

Defendant having moved the Court to dismiss the complaint, pursuant to Rule 12(b), of the Federal Rules of Civil Procedure, and the said motion having come on before the Honorable Abraham D. Sofaer, United States District Judge, and the Court thereafter on September 20, 1979, having handed down its opinion granting the said motion, it is,

ORDERED, ADJUDGED and DECREED: That the complaint be and it is hereby dismissed, without costs to either side.

Dated: New York, N.Y.
September 24, 1979

/s/ Raymond F. Burghardt
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 773, Docket 79-7748

RUBIN KREMER, PLAINTIFF-APPELLANT

v.

CHEMICAL CONSTRUCTION CORPORATION,
DEFENDANT-APPELLEE

Argued March 12, 1980

Decided June 2, 1980

Before LUMBARD, FRIENDLY and MESKILL, Circuit Judges.

FRIENDLY, Circuit Judge:

Plaintiff Rubin Kremer was employed as an engineer by defendant Chemical Construction Corporation (Chemico). He was laid off, along with a number of other employees, on August 1, 1975. Some of these employees were later rehired but Kremer was not, despite several applications. He claims that the termination and failure to rehire were due to his being of the Jewish faith; Chemico asserts it was due to legitimate business reasons.

Mr. Kremer filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b), on May 6, 1976. The EEOC, as required by 42 U.S.C. § 2000e-5(c), referred his complaint to the New York State Division of Human Rights (NYHRD). NYHRD conducted an investigation which included examination of documents submitted by Chemico and three interviews with Mr. Kremer. On March 4, 1977, he requested the EEOC to undertake an investigation in light of the lack of progress by NYHRD. On April 28, 1977,

NYHRD issued a Determination After Investigation which stated there was no probable cause to believe that Chemico had engaged in the discriminatory practice charged. Mr. Kremer appealed to the Appeal Board pursuant to N.Y. Executive Law § 297-a on both substantive and procedural grounds, and argued his case both orally and in writing. The Appeal Board affirmed the determination of the Division. Attached to the order of the Appeal Board was a notice that any complainant, respondent or other person aggrieved by the order might obtain judicial review by filing a proceeding in the appropriate Appellate Division within 30 days of service of the order.

Mr. Kremer again brought his complaint to the attention of the EEOC by letter dated December 4, 1977, and also filed, on December 6, 1977, a petition with the Appellate Division of the Supreme Court of New York for the First Department pursuant to § 298 of the N.Y. Human Rights Law and CPLR Article 78 to set aside the adverse determination of the NYHRD. On February 27, 1978, the Appellate Division unanimously ordered that the determination of the Appeal Board be confirmed. Mr. Kremer did not endeavor to obtain review by the New York Court of Appeals. The District Director of the EEOC on May 11, 1978, made a determination concluding that there was not reasonable cause to believe that the charge of discrimination was true and issued a notice of right to sue in a United States district court. After the District Director, having reviewed the case file and spoken with the investigator, denied a request for reconsideration, Mr. Kremer brought this Title VII action in the District Court for the Southern District of New York.

Chemico moved for dismissal of the complaint or summary judgment on the basis that the determination of the Appellate Division constituted a bar under the reasoning of our decision in *Mitchell* v. *National Broadcasting*

Co., 553 F.2d 265 (2 Cir. 1977), where a divided panel held that a similar judgment operated as res judicata with respect to an action under 42 U.S.C. § 1981. Judge Pierce denied the motion in an opinion, 464 F. Supp. 468 (S.D.N.Y. 1978), which sought to distinguish the res judicata effect of a state court determination on an action under Title VII from that upon an action under 42 U.S.C. § 1981, a point left open in the majority opinion in *Mitchell*, 553 F.2d at 275 n.13. Later, after our decision in *Sinicropi* v. *Nassau County*, 2 Cir., 601 F.2d 60, *cert. denied*, 444 U.S. 983, 100 S.Ct. 488, 62 L.Ed.2d 411 (1979), which applied the reasoning of *Mitchell* to a claim under Title VII, Chemico renewed its motion to dismiss or for summary judgment. Judge Sofaer, to whom the case had been transferred, felt constrained to grant the motion but delivered a lengthy opinion, 477 F. Supp. 587 (S.D.N.Y. 1979), devoted mainly to an endeavor to show that the *Mitchell* and *Sinicropi* decisions were in error.

Appealing from the judgment of dismissal, Mr. Kremer, now represented by counsel, seeks reversal on two grounds: One is that *Sinicropi* was wrongly decided; the other is that it should not be applied "retroactively."[1]

This panel cannot properly entertain the claim that *Sinicropi* was wrongly decided. In the absence of any

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[1] While neither Judge Sofaer's opinion nor the brief of counsel for Mr. Kremer suggested that *Sinicropi* was distinguishable, at the oral argument there was some discussion of a possible distinction on the basis that Mr. Kremer had gone initially to the EEOC and was sent to the New York administrative agency by it pursuant to the deferral provision of 42 U.S.C. § 2000e-5(c), whereas Ms. Sinicropi began her proceeding in the NYSHRD. Although this may make Mr. Kremer's case somewhat more attractive, we do not think the distinction has legal significance. Ultimately both claimants brought suit in a federal district court and the question is the binding effect of a determination by the Appellate Division in judicial proceedings initiated by them. If Ms. Sinicropi had gone first to the EEOC, she woud have been sent to the New York administrative agency, exactly as was Mr. Kremer.

decisions by the Supreme Court or our own court in the brief interval since *Sinicropi* was decided that would cast doubt on its viability, and none has been called to our attention, a panel of this court will not overturn a recent decision of another panel, rendered after full consideration of the very point at issue. This is something to be done, if at all, only by the full court sitting en banc. *See United States* v. *Fatico*, 603 F.2d 1053, 1058 (2 Cir. 1979), *cert. denied*, U.S. ——, 100 S.Ct. 1018, 62 L.Ed.2d 755 (1980); *Ingram* v. *Kumar*, 585 F.2d 566, 568 (2 Cir. 1978), *cert. denied*, 440 U.S. 940, 99 S.Ct. 1289, 59 L.Ed.2d 499 (1979); *In re Jaylaw Drug, Inc.*, 621 F.2d 524, 527 (2 Cir. 1980); contrast *United States* v. *Taylor*, 464 F.2d 240, 242-44 (2 Cir. 1972) (1944 decision which was no longer being followed in practice; overruling opinion circulated to and approved by all judges in active service); *Benjamins* v. *British European Airways*, 572 F.2d 913, 916-17 (2 Cir. 1978), *cert. denied*, 439 U.S. 1114, 99 S.Ct. 1016, 59 L.Ed.2d 72 (1979) (reconsideration by panel of two cases decided in the 1950's which appeared inconsistent with more recent decisions on a related subject); *Boothe* v. *Hammock*, 605 F.2d 661, 664 (2 Cir. 1979) (intervening Supreme Court decision).[2] We can be confident that the full court will

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[2] This is the rule in other circuits as well. *See, e.g., United States* v. *Caldwell*, 543 F.2d 1333, 1369 (D.C. Cir.), *cert. denied*, 423 U.S. 1087, 96 S.C. 877, 47 L.Ed.2d 97 (1976) (on petition for rehearing); *United States* v. *Inmon*, 594 F.2d 352, 354 (3 Cir.), *cert. denied*, 444 U.S. 859, 100 S.Ct. 121, 62 L.Ed.2d 78 (1979); *United States* v. *Lewis*, 475 F.2d 571, 574 (5 Cir. 1973); *Timmreck* v. *United States*, 577 F.2d 372, 376 n.15 (6 Cir. 1978), rev'd on other grounds, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979); cf. Rules of the United States Court of Appeals for the Seventh Circuit, Rule 16 ("A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court . . . shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear in banc the issue of whether the position should be adopted."). The only contrary ex-

have an opportunity to overrule *Sinicropi* if it wishes since counsel for Mr. Kremer advised us that he would seek rehearing en banc if we should affirm.[3]

We likewise reject the alternative argument that the *Sinicropi* decision should not be applied to this case because Mr. Kremer brought his proceeding in the Appellate Division a year and a half before it was rendered. "The general rule of long standing is that judicial precedents normally have retroactive as well as prospective effect." *National Association of Broadcasters* v. *FCC*, 554 F.2d 1118, 1130 (D.C. Cir. 1976). To this general rule the Supreme Court has announced an exception which was defined, with respect to civil cases, in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971):

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either

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pression we have found is in *Speigner* v. *Jago*, 603 F.2d 1208, 1212 n.4 (6th Cir. 1979), *cert. denied*, —— U.S. ——, 100 S.Ct. 1023, 62 L.Ed.2d 758 (1980) ("it would be a waste of judicial time and resources to automatically require an en banc hearing each and every time this Court overrules or modifies one of its previous decisions"). As noted, en banc rehearing is not required "each and every time" a previous panel decision is modified, but only when the basis for overruling the previous decision is simply that it is wrong although nothing new has occurred to show it to be so. The views expressed in *Speigner* were those of Judge Peck alone, since Chief Judge Edwards concurred separately, not finding it necessary to overrule the precedent in question, *id.* at 1215 n.1, and Judge Weick dissented, partly on the ground that "[n]o panel of this Court has the power or right to overrule the decision of another panel." *Id.* at 1217. For an illustration of the difficulties that can arise from panels taking divergent courses, *see Davis* v. *United States*, 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974).

[3] Rehearing en banc was denied in *Sinicropi* itself when no active judge or judge who was a member of the panel requested that a vote be taken pursuant to a petition for rehearing en banc.

by overruling clear past precedent on which litigants may have relied, *see, e.g., Hanover Shoe Inc.* v. *United Shoe Machinery Corp., supra,* [392 U.S. 481] at 496, [88 S.Ct. 2224, 20 L.Ed.2d 1231] or by deciding an issue of first impression whose resolution was not clearly foreshadowed, *see, e.g., Allen* v. *State Board of Elections, supra,* [393 U.S. 544] at 572 [89 S.Ct. 817, 22 L.Ed.2d 1]. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purposes and effect, and whether retrospective operation will further or retard its operation." *Linkletter* v. *Walker, supra,* [381 U.S. 618] at 629 [85 S.Ct. 1731, 14 L.Ed.2d 601]. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano* v. *City of Houma, supra,* [395 U.S. 701] at 706 [89 S.Ct. 1897, 23 L.Ed.2d 647].

Although the Court was not obliged to decide in *Chevron* whether it was necessary to pass each of these hurdles to secure a denial of retroactivity, since it found all the required factors were present, the courts of appeals have held that unless the first factor is satisfied, there is no occasion to consider the other two. *United States* v. *Bowen,* 500 F.2d 960, 975 & n.1 (9 Cir. 1974), aff'd, 422 U.S. 916, 95 S.Ct. 2569, 45 L.Ed.2d 641 (1975); *Ferguson* v. *United States,* 513 F.2d 1011, 1012 (2 Cir. 1973); *Jordan* v. *Weaver,* 472 F.2d 985, 996 (7 Cir. 1973), rev'd on other grounds *sub nom. Edelman* v. *Jordan,* 415 U.S. 651, 658-59 n.7, 94 S.Ct. 1347, 1353-54, 39 L.Ed.2d 662 (1974). This finds support not only in the language of the *Chevron* opinion itself, 404 U.S. at 106, 92 S.Ct. at 355 ("the decision to be applied nonretroactively *must*

establish a new principle of law") (emphasis supplied), *see Jordan* v. *Weaver*, *supra*, 472 F.2d at 996, but also by other Supreme Court decisions analyzing questions of retroactivity. *See, e.g., Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 499, 88 S.Ct. 2224, 2234, 20 L.Ed.2d 1231 (1968) (decisions applied retrospectively because they "did not constitute a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks"); *Desist* v. *United States*, 394 U.S. 244, 248, 89 S.Ct. 1030, 1032, 22 L.Ed.2d 248 (1969) (retrospectivity analysis appropriate where decision was "a clear break with the past"); *Gosa* v. *Mayden*, 413 U.S. 665, 673, 93 S.Ct. 2926, 2932, 37 L.Ed.2d 873 (1973) (same for "a decisional change in attitude that had prevailed for many decades"). Six months after writing *Chevron*, Justice Stewart wrote that "[a]n issue of the 'retroactivity' of a decision of this Court is not even presented unless the decision in question marks a sharp break in the web of the law." *Milton* v. *Wainwright*, 407 U.S. 371, 381 n.2, 92 S.Ct. 2174, 2180, 33 L.Ed.2d 1 (1972) (Stewart, J., dissenting; the majority did not reach the issue). *See generally Beytagh, Ten Years of Non-Retroactivity: A Critique and A Proposal*, 61 Va. L. Rev. 1557, 1582-83, 1608-09 (1975). Any broader reading of *Chevron* would require courts to engage in the balancing process damaged by the second and third factors whenever a recognized legal principle, here res judicata, had been applied—or not applied—to a situation not precisely covered by previous decision.

Under the first *Chevron* test it is not sufficient that the decision determines a point of law on which the court had not previously passed. In order to invoke nonretroactivity the decision must have established "a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron*, *supra*, 404 U.S.

at 106-07, 92 S.Ct. at 355. *Sinicropi* certainly did not overrule a "clear past precedent on which litigants may have relied." Prior to *Mitchell*, as shown by Judge Feinberg's dissent, 553 F.2d at 277-80, the application of state decisions to actions under various federal civil rights statutes as res judicata in general and under 28 U.S.C. § 1738[4] in particular was an area of considerable turmoil. The specific question decided in *Sinicropi* was expressly left open in *Mitchell*, *supra*, 553 F.2d at 275 n. 13, which was decided some time before Mr. Kremer took his case to the Appellate Division. There was thus nothing on which Mr. Kremer could have relied since *Mitchell* "clearly foreshadowed" *Sinicropi*. While, as stated, the *Mitchell* majority left the point open, its reasoning, 553 F.2d at 275-76, dictated the *Sinicropi* result. *See Shea* v. *City of St. Paul*, 601 F.2d 345, 351 (8 Cir. 1979). Judge Feinberg made this a principal ground of his *Mitchell* dissent, 553 F.2d at 278, and joined in the per curiam panel opinion in *Sinicropi* which stated "we all believe that the reasoning of that [the *Mitchell*] decision controls this one." Against all this it is of

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[4] This reads:

> The Acts of the legislature of any State, Territory or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
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> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

no moment that at the time Mr. Kremer resorted to the Appellate Division there were five district court decisions,[5] two in this circuit, which held that an adverse state judicial decision in a proceeding initiated by the plaintiff did not barr a Title VII action. *See Cates* v. *Trans World Airlines, Inc.*, 561 F.2d 1064, 1072-74 (2 Cir. 1974).

We add that if it were necessary to consider the second and third *Chevron* factors, our conclusion would not be different. Retrospective application of *Sinicropi* would surely further rather than retard the operation of a principle designed to prevent relitigation in the federal courts of issues already determined by the state courts. The third factor likewise is not met. A litigant represented by counsel would have known, even before *Mitchell* and surely thereafter, that going from the state administrative agency to the state courts involved serious risk of the application of res judicata if the state court decision was adverse. No one contends that Mr. Kremer, who was acting pro se, had any knowledge of the district court decisions, or, for that matter, of *Mitchell*.[6] It cannot therefore be said that litigants in Mr.Kremer's position had any justifiable reliance interest which it would be inequitable to violate by retrospective

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[5] *Young* v. *South Side Packing Co.*, 369 F. Supp. 59 (E.D. Wis. 1973); *Benneci* v. *Dep't of Labor*, 388 F. Supp. 1080 (S.D.N.Y. 1975); *Beck* v. *Mather*, 417 F. Supp. 648 (W.D. Va. 1976); *Al-Hamdani* v. *State University of New York*, 438 F. Supp. 299 (W.D.N.Y. 1977); *Nickel* v. *Highway Industries, Inc.*, 441 F. Supp. 477 (W.D. Wis. 1977). Only the latest two of these decisions, in addition to Judge Pierce's opinion in this case, *supra*, 464 F. Supp. 468, were decided after *Mitchell*.

[6] Some point is made that the notice given to Mr. Kremer by the Appeal Board of his right to obtain review in the Appellate Division may have misled him as to the consequences of failure in that court on a Title VII action. The notice was a commendable effort to inform Mr. Kremer of his rights under New York law; the Appeal Board was under no obligation to go further.

application of *Sinicropi*. *See Dasho* v. *Susquehanna Corp.*, 461 F.2d 11, 21 (7 Cir.), *cert. denied*, 408 U.S. 925, 92 S.Ct. 2496, 33 L.Ed.2d 336 (1972) (guiding principle is "to avoid unfairness to parties who may have acted in reliance on the old rule").

The judgment is affirmed.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit held at the United States Court House, in the City of New York, on the fifteenth day of October, one thousand nine hundred and eighty.

Present: HON. J. EDWARD LUMBARD
HON. HENRY J. FRIENDLY
HON. THOMAS J. MESKILL
Circuit Judges.

79-7748
[79-7748]

RUBIN KREMER, PLAINTIFF-APPELLANT

v.

CHEMICAL CONSTRUCTION CORP., DEFENDANT-APPELLEE

Filed: Oct. 15, 1980

A petition for a rehearing having been filed herein by counsel for the appellant Rubin Kremer,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of October, one thousand nine hundred and eighty

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79-7748
[79-7748]

RUBIN KREMER, PLAINTIFF-APPELLANT

v.

CHEMICAL CONSTRUCTION CORPORATION,
DEFENDANT-APPELLEE

Filed Oct. 15, 1980

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, and a poll of the active judges having been taken, and there being no majority in favor thereof,

UPON CONSIDERATION THEREOF, it is

Ordered that said petition be and it hereby is DENIED.

Judges Oakes and Newman voted in favor of rehearing in banc.

/s/ Wilfred Feinberg
Chief Judge

SUPREME COURT OF THE UNITED STATES

No. 80-6045

RUBIN KREMER, PETITIONER

v.

CHEMICAL CONSTRUCTION CORPORATION

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

ON CONSIDERATION of the motion for leave to proceed *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

June 22, 1981

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